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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 15.

IOWA-DES MOINES NATIONAL BANK, *Petitioner*,

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

The brief of respondents filed herein upon the main issues involved, does not in the least purport to justify or sustain the majority opinion of the Supreme Court of Iowa in this case on the grounds upon which the majority opinion is based.

On the contrary, respondents have presented numerous propositions and contentions, all of which were presented to the court below, and all of which, with the exception of one relating to only one branch of the case, were ignored by the majority opinion, and answered and denied by the minority.

We feel, however, that we may be of aid to the Court by replying to the Propositions in the order in which they are stated in the brief of respondents.

I.

Proposition I in respondents' brief (Pages 59 to 81) is subdivided into several subjects, and we will consider them in the order stated.

As to the Claim that Mandamus was not the Proper Remedy.

Insofar as the claim of petitioner is based upon the acts of the county auditor of Polk County, Iowa, in changing the assessments of owners of shares of stock in domestic corporations, and applying thereto the five mill levy, resulting as claimed in a gross discrimination in favor of such capital, the Supreme Court of Iowa, in both the majority and the minority opinions, has treated the case as one properly the subject of an action of mandamus, which, by statute, is declared to be an action in equity.

Therefore, the case in this aspect is not one of jurisdiction, but one for consideration on its merits. And it seems to us the language employed by this Court in *First National Bank of Guthrie Center v. Anderson*, 269 U. S. 341 must necessarily conclude and dispose of this contention, for there it is said:

> "The Supreme Court of the State treated the case as cognizable in equity, and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that Court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here."

But, considering this contention of respondents aside from this rule, we can find no more convincing statement than that employed by the minority of the Supreme Court of Iowa in its decision (Record, 1369 to 1371) as follows:

"The appellees also contend that mandamus is not the proper remedy. The holdings of this court are against this contention. See *Steele v. Madison County*, 198 Iowa, 902; *Murphy v. Berry*, 200 Iowa 974; *Home Savings Bank v. Morris, et al.*, 141 Iowa 560; *Eyerly v. Jasper County*, 72 Iowa 149; *Beecher v. County of Clay*, 52 Iowa 140; *The Dubuque & Sioux City R. Company v. The Board of Supervisors*, 40 Iowa 16; *Fort Madison Security Company v. Maxwell*, 202 Iowa 1346; *Farmers Insurance Company v. Linn County*, 202 Iowa 444; *The Commercial National Bank of Council Bluffs v. Board of Supervisors*, 168 Iowa 501; See also Section 1417 of the 1897 Code (now Section 7235, Code of 1927), which is the statutory authority under which the appellants bring this action. It provides:

> 'The Board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon'.

It must be borne in mind that under Section 5219 of the Revised Statutes of the United States, the taxation of National Banks shall not be at a greater rate than upon other moneyed capital. If the shares of stock in the alleged competitive institutions is moneyed capital within the meaning of the law, then the action of the county auditor in changing the assessment of their stock from personal property—from 'corporate stock'—to 'moneys and credits' under the five mill statute, and leaving the appellants' assessments on 'corporate stock' at the consolidated levy rate, compels the appellants to pay at a greater rate than, and from five to seven times as much as the competitive institutions, and thereby makes the tax which the appellants were compelled to pay an illegal tax—in contravention of the provisions of Section 5219 of the Revised Statutes of the United States; and when the appellants were compelled to pay said amount, it was illegally and erroneously exacted. In *Commercial National Bank v. Board of Supervisors*, 168 Iowa 501, we declared:

'Such an order (to refund) is essential to repayment by the treasurer and to enter it, in a proper case, is the mandatory duty of the board of supervisors.'

In *Home Savings Bank v. Morris*, 141 Iowa 560, we find the following pronouncement:

'It seems to us that the statute (Section 1417 of the Code of 1897) itself fully answers the appellants' contention. It says in so many words just what shall be done. It says that the treasurer shall be directed to refund the tax illegally paid,' etc.

In the recent case of *Steele v. Madison County*, 198 Iowa 902, an action at law was brought by a National Bank to recover from the County taxes alleged to have been illegally exacted, because of a violation of the restriction contained in Section 5219 of the Revised Statutes. We there said:

'* * * that if the board of supervisors refuse to do its duty and order a refund of the portion of the taxes erroneously or illegally exacted, an action in mandamus will lie to compel such refund.' (Citing numerous cases.)

Indeed, if the taxing authorities, through the action of the county auditor, so fixed matters that, in contravention of the provisions of Section 5219 Revised Statutes of the United States, an amount has been exacted in taxes upon the shares of stock of the National Banks at a greater rate than upon the shares of stock of the alleged competitive institutions, and are not now entitled to a remedy in mandamus to put them on equality with the competitive institutions, which have paid their taxes based on a lesser rate, the appellants would be remediless. See, as bearing on this proposition, *Greene v. Louisville & I. Railroad Co.* (U. S.) 61 L. Ed. 1280; *Sioux City Bridge Company v. Dakota County* (U. S.) 67 L. Ed. 340."

As to the Claim that Petitioner Sought to Use the Writ of Mandamus as a Means of Appeal or as a Writ of Error.

Petitioner sought by this action to enforce a right expressly declared by statute (Section 1417, Code of Iowa, 1897, as amended) by employing the means, viz., a statutory action of mandamus, declared to be the exclusive remedy by the Supreme Court of the State of Iowa. *Steele v. Madison County*, 198 Iowa 902, and cases hereinbefore cited. Therefore, we do not have a case involving the extraordinary common law remedy of mandamus, and the quotations as well as the cited case of *Interstate Commerce Commission v. Merchants Association of New York*, 260 U. S. 32, have no application.

As to the Claim that Petitioner Sought to Attack the Decision of the Board of Supervisors in a Collateral Manner.

This contention is necessarily predicated upon the premise that the board of supervisors acted in a judicial capacity. This assumption is necessarily erroneous, because in acting upon claims for the refund of taxes the board of supervisors acts purely in an administrative capacity as an auditing board, and not judicially. The board of supervisors is by statute made the administrative body, charged with the management of the business and governmental affairs of the county. Among the general powers conferred upon the Board by statute, is the power "to examine and settle all accounts, all receipts and expenditures of the county, and to examine, settle, and allow all claims against the county, unless otherwise provided by law". (Section 5130, Code of Iowa, 1927.)

Section 5123 provides as follows:

"Claims generally. Claims filed shall be numbered consecutively in the order of filing, and shall be entered

on the claim register alphabetically, so as to show the date of filing, the number of the claim and its general nature, the name of the claimant and the action of the board thereon, stating, if allowed, the fund upon which allowance is made. A record of the allowance of claims at each session of the board shall be entered on the minute book by reference to the numbers of the claims as entered in the claim register."

Section 5124 is as follows:

"Unliquidated claims. All unliquidated claims against counties and all claims for fees or compensation except salaries fixed by statute, shall, before being audited or paid, be so itemized as to clearly show the basis of any such claim and whether for property sold or furnished the county, or for services rendered it, or upon some other account, and shall be duly verified by the affidavit of the claimant, filed with the county auditor for presentation to the board of supervisors; and no action shall be brought against any county upon any such claim until the same has been so filed and payment thereof refused or neglected."

Section 7235 previously Section 1417 Code of 1897 does not appear in the chapter relating to the duties of the Board of Supervisors, but is found in the chapter relating to the collection of taxes. It provides simply that the Board shall direct the treasurer to refund any tax or portion thereof found to have been erroneously, or illegally exacted or paid. No method of procedure in connection with claims for refunds of taxes, as distinguished from other classes of claims filed with the Board, is provided by statute. Sections 5123 and 5124 clearly contemplate that the Board of Supervisors shall not act in a judicial capacity in allowing or disallowing claims, for it is expressly provided that suit may be brought on unliquidated claims after presentation thereof to the Board.

Nor do we find anything in Section 7235 which indicates an intention on the part of the legislature that in passing on claims for refunds of illegal taxes, the Board is vested with

jurisdiction to determine the legality or illegality of the taxes.

The Iowa Supreme Court has on several occasions rejected the very theory now advanced by counsel for the respondents. The early case of *Campbell v. County of Polk*, 3 Iowa 467, arose when the management of county affairs was vested in an officer known as the county judge. The county judge was also given probate jurisdiction, performed many of the functions now vested in the clerk of the District Court, and was the managing officer charged with the administration of county affairs. The county had occasion to purchase a tract of land. Certain commissioners had negotiated the terms of the purchase and had paid a portion of the purchase price. By mistake, the county judge issued warrants in payment of the full purchase price. An action was brought against the county on these warrants, and the county set up in defense that the warrants were without consideration, and issued through mistake. The trial court sustained a demurrer to this answer on the ground that in issuing the warrants, the county judge acted in a judicial capacity, and that his determination that the warrants should be issued was not subject to a collateral attack. The Supreme Court reversed the case holding that while the county judge exercised many judicial functions, in allowing or rejecting claims against the county, and in issuing warrants, he acted in a purely ministerial capacity, and that his action was open to review at any time.

The leading case in Iowa is that of *Hospers v. Wyatt*, 63 Iowa 264. It there appeared that two men named Ross and Bell had paid the taxes on certain tracts of land for the years from 1866 to 1880 inclusive. It later developed that the taxes were illegal. Ross and Bell presented a demand for refund of the taxes for the fifteen years, to the Board of Supervisors, which allowed the claim, and directed the auditor to issue a warrant, or refunding order. The plaintiff, a taxpayer, brought an injunction action against the auditor to enjoin the

issuance of any warrant covering that portion of the taxes which were barred by the statute of limitations, and certain items, which the plaintiff alleged Ross and Bell had no right to recover. The trial court enjoined the county auditor from issuing the warrants. On appeal it was contended that the Board of Supervisors in allowing the claims for refund acted in a judicial capacity, and that the propriety of the board's action could not be questioned by an injunction suit. It will thus be seen that the issue of law was the identical issue raised by counsel for the appellees in this case. In passing upon the question in an opinion by Mr. Justice Seevers, the Iowa court said:

> "It will be conceded, if the board acted judicially, that injunction is not the proper remedy. That the board of supervisors, in relation to many matters, act judicially, will also be conceded; but that they do so in the allowance of claims against the county cannot, we think, be the rule. If this is so, then the determination of the board, while it may not have the force and effect of a judgment in so far as relates to its enforcement, must of necessity be final and conclusive as an adjudication, so far as the amount allowed is concerned, if the same is not annulled or set aside in some direct proceeding, such as an appeal or certiorari. It has been held that the allowance of a claim by a city or school district by the proper auditing board thereof, and a warrant issued therefor on the treasurer, is not final and conclusive as an adjudication, but that, in an action brought on such warrant, the city or school district may plead and establish that the allowance of the claim was illegal and not authorized by law. *Clark v. The City of Des Moines*, 19 Iowa, 199; *Eastman, Bovee & Co., v. The Dist. Twp. of Lyon*, 40 Id. 438.
>
> In *Campbell v. Polk County*, 3 Iowa, 467, which was an action brought on county warrants, it was pleaded as a defense that they were issued without consideration and through mistake. To this defense a demurrer was filed, on the ground that, when the county judge had once passed upon a matter within his jurisdiction, that action was final, unless appealed from or impeached for fraud.

The demurrer, it was held, had been erroneously sustained. And the reasoning of the court in determining the question before it favors strongly, to say the least, the position that the acts of the county judge in allowing a claim against the county was not a judicial act, except that an appeal was allowed therefrom, and to that extent it must be so regarded.

The powers of the board of supervisors in relation to the allowance of claims against the county are not greater than those of the county judge; (Code of 1851, Sec. 106;), and therefore, the same rule must prevail. If the allowance of the claim constitutes an adjudication and judgment, it must, as has been said, have the force and effect of a judgment, so as to preclude all inquiry as to its correctness. The warrant issued thereon, should, if the judgment is conclusive, have the force and effect of an execution; but we have seen that this is not so. Now, if the warrant can be impeached for illegality, as not authorized by law, it seems to us that it necessarily follows that the allowance of the claim may be impeached in like manner, and for the same causes."

The foregoing authorities amply demonstrate that in allowing or rejecting claims for refunds of taxes under Section 7235, the Board of Supervisors act in a purely administrative capacity and do not exercise judicial functions.

As to the Claim that Petitioner Cannot Maintain This Action Because the Proper Parties are not Before the Court.

This contention is based upon the claim that the State of Iowa, Polk County, City of Des Moines, and the Independent School District of Des Moines, are affected by the result, and are not as such made parties to the action.

The contention overlooks the provisions of Section 1417, of the Code of Iowa, 1897, which was in force at the times involved herein, (now Section 7235, Code of Iowa, 1927), which requires the board of supervisors to direct the treasurer to refund to the taxpayer any tax or portion thereof found

to have been erroneously or illegally exacted or paid, with interest and costs actually paid thereon; and also the fact that the Supreme Court of Iowa has declared the sole and exclusive remedy to be by mandamus upon the officers named in this statute.

As to the Claim that Petitioner's Remedy, if any, is at Law.

This contention is based upon the claim that only an action in certiorari may be maintained. This claim is not sustained by, and is contrary to, the decisions of the Supreme Court of Iowa hereinbefore referred to.

The writ of certiorari can only be used to review the proceedings of an inferior board or body exercising judicial functions.

Code of Iowa, 1927, Section 12456, provides:

> "The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board, or officer *exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally* * * *". (Italics ours.)

Under this statute the writ of certiorari is not available to control the action of administrative bodies, and as the board of supervisors in allowing or disallowing claims for refund under this statute do not act in a judicial capacity, there can be no remedy by way of certiorari.

No authorities dealing with the subject of tax refunds are cited by counsel for the respondents in support of their contention, except the case of *Commercial National Bank vs. Board of Supervisors*, 168 Iowa, 501. This case squarely holds that Sec. 7235 imposes a mandatory duty upon the Board of Supervisors to make refunds of taxes illegally exacted. The facts of that case were that the Commercial National Bank of Council Bluffs filed with the Board of Super-

visors of Pottawattamie County a claim for a refund of taxes exacted upon the shares of a National Bank, under a statute subsequently declared invalid, because in violation of Section 5219 of the Revised Statutes of the United States. The Board of Supervisors denied the refund and the Bank sued in mandamus. The Iowa Court held that mandamus was the proper remedy, that the Board acted in a purely ministerial capacity, and that it was the mandatory duty of the Board to make the refund sought. We quote the following from the opinion in that case:

> "II. The duty of the board of supervisors is equally explicit. Having ascertained that the taxes have been illegally or erroneously exacted or paid, the statute prescribes precisely what shall be done, i. e., the board shall direct the treasurer to refund them to the taxpayer. Such an order is essential to repayment by the treasurer and to enter it, in a proper case, is the mandatory duty of the board of supervisors. That there is no adequate remedy at law sufficiently appears from the cases cited and as the contention is that the board of supervisors omitted a duty the performance of which the law enjoins, mandamus is the proper remedy. Section 4341, *et seq.*, Code; *Eyerly v. Jasper Co., supra;* See *Beecher v. County of Clay*, 52 Iowa 140; *The Dubuque & S. C. Ry. Co. v. Board of Supervisors*, 40 Iowa 16."

We submit that the case supports the contention of the petitioner and is not available to the respondents as an authority.

The next case cited is that of *Clark v. Board of Directors*, 24 Iowa 266. In this case a writ of mandamus was issued by the trial court ordering the defendants to enroll the plaintiff in a particular public school in the district in which she resided. Plaintiff was a colored child who had been denied admission to a particular school, because of an attempt on the part of the Board to establish a school for colored children exclusively. The court says that it was the mandatory duty

of the board of directors to permit the plaintiff to attend the school in the district wherein she resided, and that no discretion was vested in the Board with reference to the segregation of races in the public schools. The case does not support the contention of the respondents.

In *Preston v. Board of Education*, 124 Iowa, 355, it appeared that the Board of Directors of an independent school district had denied the plaintiff the right to attend the school without payment of tuition on the ground that she was a non resident of the district. The defendants demurred to the petition because the Board were vested with power to determine the residence of the plaintiff as a fact question, and on the further ground that the plaintiff had an adequate remedy at law by way of appeal to the county superintendent of schools from the decision of the board of directors. It was held that the decision of the board could not be reviewed in an action in mandamus, and the opinion concludes as follows:

> "Conceding now, that the Board reached an erroneous conclusion, it is clear that the remedy was by review of the facts and the judgment predicated thereon. This the law provides for in the way of an appeal to the county superintendent of schools."

Of course where there is an adequate remedy by way of appeal from the decision of an inferior tribunal, the remedy in mandamus will not lie, and as there was a right of appeal to the County Superintendent of School to correct the erroneous decision of the Board of Directors the remedy of mandamus was not available to plaintiff.

The cases of *Scripture v. Burns*, 59 Iowa, 70, *Sullivan v. Robbins*, 109 Iowa, 235, *Littell v. Webster County*, 152 Iowa, 206, and *Collins v. Board*, 158 Iowa, 322, are cited by counsel for the respondents in support of their contention that the instant case constitutes a collateral attack upon a judgment of the Board of Supervisors. None of these cases support the

argument of counsel. They are merely cases in which the Boards acted in an administrative capacity but were vested with a discretion as to the performance or non-performance of certain acts. Thus in *Littell v. Webster County, supra,* it is held that mandamus will not lie to compel the engineer and Board of Supervisors to accept an improvement under a drainage contract. These cases have no bearing upon the question before the Court for decision.

The case of *Woodbury County v. Talley,* 147 Iowa, 498, is apparently strongly relied upon by counsel for respondents. The facts in that case were that the Sioux City Stock Yards Company had been assessed as a merchant and no assessment had been returned against the stockholders of the corporation upon their shares of stock. The real estate was separately taxed. A tax ferret, employed to discover omitted property, requested the treasurer to make and enter an assessment upon the shares as omitted property. The treasurer after notice to the corporation held a hearing and entered his decision in writing, stating that he was without authority to make an assessment upon the shares as omitted property. The Iowa Supreme Court held that mandamus was not available to review the determination of the County Treasurer, as he acted in a purely judicial capacity, and was clothed with the power of deciding whether the property was omitted property, and whether it was properly subject to assessment and taxation. As the treasurer was acting judicially, and had authority to determine the question in the first instance, mandamus would not lie to control the exercise of that jurisdiction. The case is clearly distinguishable from the case at bar because in passing upon claims for refunds of taxes under Section 7235 the Board of Supervisors acted as an administrative auditing board, not as a judicial tribunal, clothed with the authority of determining the legality or illegality of the taxes.

A claim for refund of taxes is a claim upon the tax funds, and as the County Treasurer is the officer collecting

taxes, and as they are disbursed by him under the order of the Board of Supervisors, the statute requires that the claim be made to the Board, but that does not mean that in allowing or rejecting the claim the Board acts judicially. They act in the same capacity in allowing or rejecting a claim under Section 7235 as in allowing or rejecting any other claim against the various county funds.

As to the Claim that Mandamus Will Not Lie to Compel the Payment of Money by Public Officers if There Is No Fund Out of Which It Can Legally be Paid.

In support of their contentions, counsel cite two Iowa cases. The first is that of *Rice v. Walker*, 44 Iowa, 458, which states the rule that an officer will not be required by writ of mandamus to do that which it is impossible for him to do, even though he has put it beyond his power by his own action. The facts of that case were briefly as follows: The plaintiff procured a judgment for personal injuries against the City of Des Moines. In the years 1874 and 1875 the city levied a tax of eight mills for a judgment fund, and realized therefrom for the year 1874 $31,941.00, and at the time of the trial had not yet collected the money for the taxes of the year 1875. The City Council had diverted about $10,000 from the judgment fund to pay interest on bonds, and $17,000 had been transferred therefrom to the general fund of the city, and largely exhausted in payment of general expenses. The trial court awarded a peremptory writ of mandamus directing the defendant as treasurer of the City of Des Moines to forthwith pay the plaintiff's judgment. It was held that a writ of *mandamus* should not be issued against a public officer to compel the performance of an act which had become impossible. We quote the following from the opinion of the court:

"The judgment of the Circuit Court should be so modified that a writ of mandamus issue, commanding the defendant to pay to plaintiff his said judgment with interest and costs, so far as he may be able to do so with funds in the city treasury collected either from the tax of 1874, levied 'for judgment fund,' or from the tax of 1875, levied 'for city judgment tax,' whether the same may have been transferred or credited to any other fund or not.

The injunction restraining the diversion of said taxes was properly granted."

The foregoing recital shows that the facts were not comparable to those presented by this record, and the conclusion of the court supports our contentions rather than those of counsel for respondents. The case of *Iowa Railway Land Co. v. Woodbury County*, 64 Iowa 212 is equally inapplicable to the present controversy. That was an action at law against a county to recover taxes illegally exacted. It affirmatively appeared that a large portion of the taxes had been distributed to the various governmental sub-divisions. The court says:

"It is the tax which has been illegally or erroneously exacted which is to be refunded. The clear meaning of this is that the money which is to be returned to the tax payer is to be taken from the particular fund or funds into which the illegal tax went when it was collected. The section clearly does not impose on the county the burthen of paying any portion of such taxes out of its general funds, except the amount thereof which has gone into that fund. The county is not made liable for any portion of the tax illegally or erroneously collected, except the amount which is collected for its use. But the duty imposed on the board of supervisors is to order the treasurer to refund to the tax payer, from each of the separate funds for the benefit of which the tax was collected, the amount thereof which is found to have been illegally or erroneously exacted from him. And any judgment rendered against the county on account of the collection of such tax should be satisfied by moneys

taken in proper proportion from the several funds into which the tax went when collected."

It is quite apparent from this opinion that the case supports our contentions rather than those of respondents. It specifically holds that mandamus is the proper remedy to compel refunds of taxes illegally exacted, and that such remedy is exclusive when the taxes have been distributed to the various governmental sub-divisions. It is quite apparent that these authorities do not sustain the contention of counsel that proof of the existence of a fund sufficient to satisfy the claim is necessary in a mandamus action. There are some cases to which the rule stated by counsel might be applicable. Thus, if in this case petitioner were demanding the issuance of writs of mandamus compelling the County Treasurer to forthwith pay certain claims or warrants, the rule would apply. In this case petitioner does not seek a writ commanding the respondents to pay the refunds. The petitioner prays that a writ issue compelling the Supervisors to order the payment, or to direct the auditor to draw a warrant on the treasurer for the proper amount. If the warrant or order is issued petitioner may then be faced with the necessity of invoking the remedy of mandamus to compel the levy of a tax to pay the warrants or orders. But that question is not now involved.

It was the intention of the legislature that the Board of Supervisors should order refunds under this section, to be made from the several funds to which the taxes were originally distributed, and the fact that distribution may have been made of the tax money originally paid does not in any sense affect the right of the taxpayer to have the same repaid from such funds. The opinion of Justice Ladd in *Commercial National Bank v. Board of Supervisors*, 168 Iowa 501 clearly shows this intention. We quote the following from the opinion:

"The manifest design of this statute is that the board of supervisors first ascertain whether the taxpayer is entitled to be reimbursed for taxes illegally or erroneously exacted and if so, that the treasurer be directed to repay the same from the several funds to which these have passed. Such was the interpretation given in *Iowa Ry. Land Co. v. Woodbury Co.*, 64 Iowa 212, where recovery against the county was denied, and this decision was followed in *Eyerly v. Jasper County*, 72 Iowa 149. It is the duty of the treasurer only to repay from the particular funds into which the taxes have gone and, when necessary, to ascertain by computation the amount to be taken from each. *District Township of Spencer v. District Township of Riverton*, 56 Iowa 85. The result attained is the restoration of the moneys illegally or erroneously paid by the taxpayer, and each fund continues as though these had never been collected. The remedy is perfect."

If proof of the existence of a fund is necessary in a case of this character, the fact remains that the record contains an abundance of proof of the existence of such a fund.

The record affirmatively discloses that after the filing of the claims for refunds with the Board of Supervisors, the County Treasurer collected and remitted to the State of Iowa, to the City of Des Moines, and to the Independent School District millions of dollars, all of which might legally have been applied in payment of petitioner's claim for refunds. In the year 1926 the county treasurer remitted to the treasurer of the Independent School District of Des Moines $2,972,351,08, to the treasurer of State $408,034.21 for state general revenue and for soldiers bonus $94,069.59. The treasurer retained out of the tax moneys collected by him in 1926 for county purposes $1,333,597.28; to the Treasurer of the City of Des Moines he paid $2,724,250.82. Correspondingly large amounts were paid to the Treasurer of State, the Treasurer of the Independent School District, and the Treasurer of the City of Des Moines in the year 1927. Exhibit 1765 is a tabulation prepared by the deputy county auditor of Polk

County. It shows that in the taxing district of the City of Des Moines $424,295 would be collected for state revenue in the year 1928; $1,197,457.00 for county purposes; $2,737,-872.00 for the City of Des Moines, and $3,038,901.00 for the Independent School District. We submit therefore that the evidence of the petitioner shows without dispute the existence of large sums of money in the hands of county treasurer more than sufficient to meet the claim of the petitioner.

II.

By Proposition II in respondents' brief (Pages 77 to 81) it is contended that petitioner's remedy was by appeal from the local board of review.

The Supreme Court of Iowa by both the majority and minority opinions in this case held that insofar as the assessment of moneys and credits, other than stock in domestic corporations owned by indivduals, was concerned, the petitioner was remitted for its remedy to an appeal from the local board of review. At the same time the opinion of the Supreme Court of Iowa holds that insofar as the assessment of shares of stock in domestic corporations was concerned, petitioner was not remitted to an appeal from the local board of review.

The contentions set forth in this proposition have been fully and completely answered in Subdivision VI of the brief of petitioner filed herein, and we deem it unnecessary to reiterate the argument there advanced.

III and VI.

By Propositions III and VI in respondents' brief (Pages 81 to 119) it is contended that it was not shown by the record that there was in the years involved a substantial amount of moneyed capital, within the meaning of Section 5219 of

the Revised Statutes of the United States, which was subjected to taxation at a grossly favorable and discriminatory rate.

Before proceeding to a consideration of the contentions advanced in respondents' brief, we desire to briefly correct some inaccuracies and omissions in the so-called "Statement of the Evidence" set out at pp. 16 to 42, inclusive of respondents' brief. This statement is neither fair nor complete, and in many instances distorts the actual evidence introduced. We substitute, therefore, the following brief resume of the testimony in place of that found in respondents' brief.

Security Loan & Investment Company. The secretary-treasurer of this company testified that it was engaged in the real estate loan business and handled the purchase and sale of public improvement bonds and certificates, dealt both in farm loan mortgages in central Iowa and in mortgages on residence and business properties in Des Moines, which it sold to purchasers including life insurance companies and individual investors. It purchased and sold municipal and public improvement securities, it financed public improvement contractors, making advancements of funds to enable the contractor to complete the job, and took in payment the municipal securities in which the contractor was paid. It issued debenture bonds which it sold to investors, sold real estate bond issues, and from 1919 to 1922 did a maximum business of $600,000 per year in public improvement securities. Its mortgage loan business amounted to two and one-half or three million dollars per year. The witness did not testify, as set forth on p. 16 of respondents' brief, that "The company also as a habit made loans in excess of fifty per cent of the value. One mortgage would be for the fifty per cent amount, and the second mortgage for the balance. These excesses amounted to $350,000 of the assets." The witness did testify.

"We had some second mortgages among our assets during the four-year period. When we sold the second mortgages we almost always guaranteed them. In some instances we made a loan upon property which seemed a little higher than we wanted to make as a first mortgage, and we would have one note and mortgage representing a first lien, and smaller amounts which were sold subject to the lien of the larger notes. I would say that we had a total of over $300,000 either in the hands of the Company or in the hands of our customers of that character." (R. 206) (See R. 197-215.)

Iowa Investment & Mortgage Company. The president of this corporation testified that the business carried on during the period from January 1, 1919 through 1922 was making real estate first mortgage loans on residence and business property in the city of Des Moines, with very few farm loans. The company sold its loans to investors and kept its capital and surplus invested in such securities. On January 1, 1919 it held $37,273 of mortgage loans. On p. 17 of their brief, counsel purport to quote the testimony of this witness as follows: "We did not make the loans ourselves, but they were Prudential loans made on their mortgage blanks and their notes. We simply handled them as their correspondent." This statement is inaccurate. The witness did testify:

"The Prudential Insurance Company called us correspondents. When they first started with us, we did not advance our own money on their loans, but on account of competition and the time it took for them to close loans and get the money to us, we made an arrangement with them after the loan had been approved and the abstract had been examined, by which we paid out our money and closed the loan, and sent them the papers and they remitted to us. We got the interest on the money until the loan was accepted and approved by the Prudential Company. We charged a commission for handling such loans which was paid by the borrower in each instance." (R. 222.) (See R. 218 to 224.)

Central Iowa Joint Stock Land Bank. The president of this corporation testified that it made first farm mortgage loans in Iowa as prescribed by the Federal Farm Loan Act. It issued bonds which were secured by the deposit of farm mortgages with a government registrar. On January 1, 1920, its statement to the assessor disclosed "Bills Receivable, Mortgages—$771,200". On January 1, 1921 it reported "other credits due or to become due, $1,350,235", and on January 1, 1922 reported "Bonds Outstanding, $1,520,000." (R. 220-224.)

Des Moines Morris Plan Company. The president of this company testified that its business was loaning money. It made loans with two persons as co-signers with the borrower. It purchased paper from automobile dealers secured by liens on automobiles both in Des Moines and in adjacent towns. It purchased trade acceptances from dealers in household appliances, secured by the endorsement of the dealer. It financed dealers in washing machines, vacuum cleaners, sewing machines, and similar articles. The gross volume of automobile paper handled in 1920 approximated $1,000,000 and somewhat lesser amounts in subsequent years. It rediscounted automobile paper in New York, and secured additional funds by the sale of "investment certificates" which drew interest. The volume of household appliance paper approximated $100,000 per year. (R. 248-256.)

Continental Securities Company. The president of this company testified that the business in which it was engaged was largely a first mortgage real estate loan business, making loans on city property in Des Moines and some farm loans in the immediate vicinity of Des Moines. Most loans were on improved real estate, with some loans to finance construction of homes. The company sold its mortgages to investors both locally and in different parts of the country where it had clients. The volume of mortgage loan business transacted was approximately $150,000 to $200,000 per annum. It issued

debenture bonds secured by deposit of mortgages, and purchased securities from public improvement contractors, and financed such contractors in some instances while the work progressed. (R. 257-260.)

Iowa Guarantee Mortgage Corporation. The president of this company testified that it discounted conditional sales contracts covering the sale of automobiles sold on the deferred payment plan. During 1919 and 1920 the company loaned money to dealers in automobiles, secured by warehouse receipts on cars and trust receipts for automobiles in the dealer's possession. On January 1, 1920 the company reported to the assessor "Notes, $347,000". These were automobile notes and trade acceptances. On January 1, 1921 it reported notes of $321,339 of the same character. The volume of transactions handled by this company in the four years in controversy was: 1919—$1,013,940; 1920—$1,179,032; 1921—$411,751; 1922—$606,999. It deposited these securities with the Des Moines Savings Bank & Trust Company as trustee and issued against them collateral gold notes or bonds which were sold to banks in Iowa and Illinois. (R. 261-266.)

Federal Cattle Loan Society. The testimony with respect to this company is correctly stated in respondents' brief, except with respect to Exhibit 1480 the following statement should be eliminated: "The other item, $267,453.31, is stock notes given for corporation stock." (R. 274-280.)

Garner Investment Company. The statement on pp. 24 and 25 of respondents' brief is substantially accurate. (R. 266-272.)

Jesse F. Stevenson Company. The statement on pp. 25, 26, and 27 of respondents' brief is substantially accurate, but we add thereto the following from the testimony of the president:

> "We had some cases in which customers of our institution would leave money with directions as to the

manner of its investment. In some cases the money was received in the way of advance payments for securities with deliveries to be made later. In some cases it was left with carte blanche authority. In such case the money was merged with the funds of the company, and the customer was paid interest." (R. 288.)

Farmers Bond & Mortgage Company. The president of this company testified that it was engaged in the first mortgage loan business on Iowa farm land and Des Moines property. It made farm loans in Central Iowa which it sold to investors. It issued first mortgage certificates which it sold to investors, which certificates were secured by the deposit of mortgages with a trustee. On January 1, 1922, it held mortgage loans and liberty bonds to the extent of $179,200. The statement appearing on p. 28 of respondents' brief—"When the loans were made, the company negotiated them and sold them to insurance companies mostly. Few mortgages were sold to private investors." should be eliminated, and the following substituted therefor:

> "The company negotiated the loans and sold them to insurance companies, or other investors. The city mortgages were sold to individual investors largely, and the farm mortgages to insurance companies." (R. 292.)

The company did a gross volume of business in 1920 to 1922 of about two million dollars.

Motor Finance Company. The statement found in pp. 28 and 29 of respondents' brief is substantially correct. (R. 298-300.)

Union Mortgage & Cattle Loan Company. The secretary of this corporation testified that it engaged in loaning money on Iowa farm lands and making loans on cattle secured by chattel mortgages. It secured its cattle loan paper through country banks. It made some loans to individual borrowers on open notes. On January 1, 1921 it had in its bills receivable account $184,426 and in its mortgage account $1,001,-

946. It sold its securities to private investors and issued and sold some debenture bonds. The secretary testified: "The theory of our Bills Receivable account was a commercial banking business—secured by chattel mortgage sometimes and secured by endorsements." (R. 300, 318-323.)

Bond & Mortgage Company of Iowa. The auditor of this company testified that it was in the investment business, buying and selling bonds, mortgages, notes, and securities. It made first real estate mortgage loans, both farm and city, operated in the City of Des Moines and in nearby towns. It sold city loans to the Metropolitan Life Insurance Company of New York. The volume of business exceeded $400,000. The company also dealt in various types of bonds. It financed public improvement contractors, and purchased improvement bonds at a discount, and it sold these bonds. The volume of business in bonds and municipal improvement securities approximated $1,000,000. It purchased $800,000 to $900,000 of notes. It financed dealers in automobiles by the purchase of notes and contracts secured by liens on automobiles. (R. 308-309.)

Manning Martin Company. The statement on pp. 32 and 33 of respondents' brief is substantially accurate. (R. 307-309.)

Des Moines Joint Stock Land Bank. The statement on pp. 33 and 34 of respondents' brief is substantially accurate, but we add the following: On January 1, 1920 the company reported "Mortgages $1,172,399" and "Liberty Bonds $666,455". On January 1, 1922 the company had $1,600,000 outstanding in farm loan bonds and held $42,400 in Liberty Bonds. (R. 312-313.)

First and Second Mortgage Corporation. The secretary of this corporation described its business as a general investment and brokerage business in investment securities. The company bought and sold mortgage loans, acted as broker or agent in the negotiation of such loans. It did a business of

between two and three million dollars in securities during the four years 1919 to 1922 inclusive. It acted as loan agent for the Des Moines Joint Stock Land Bank, Lincoln Joint Stock Land Bank, Chicago Joint Stock Land Bank, Central Life Insurance Company of Des Moines, and Illinois Merchants Trust Company of Chicago. It dealt in government bonds and in industrial bonds to some extent. It secured an issue of bonds of the LeMars Gravel Company by trading stock subscription notes. (R. 313-317.)

Continental Mortgage & Loan Company. The statement on p. 35 of respondents' brief is substantially accurate. (R. 337-340.)

Des Moines Discount Company. The secretary-treasurer of this company testified that it bought notes, automobile contracts, and loaned money on collateral security. Most of the notes ran from six months to one year. On cross examination the witness testified that the company handled the class of business that the banks did not handle. On re-direct examination he said that the reason that such paper was not handled by banks was because the maturity was a little longer than the banks would want to handle. (R. 341-343.)

Bankers Mortgage Company. The vice-president of this company testified that it dealt in farm mortgages, municipal, public utility, and industrial bonds. The company made loans on Iowa farms direct to borrowers, with whom it got in touch through its stockholders and country bankers. It sold farm mortgage loans to insurance companies and other investors. The company bought entire issues of municipal, county, and school bonds throughout Iowa. It dealt in Liberty Bonds, railroad bonds, and foreign government bonds. It did a business of approximately $1,000,000 during the year 1919. The statement "The company got the loans the bank did not want to make." is incorrect. The vice-president of the company testified: "Some of the banks in the city were not making all of the mortgages at that time that they had at

chance to make, and we frequently got business from one or another of the banks in the city." (R. 343-347.)

United Mortgage Loan Company. The president of this company testified it made loans on real estate, both first and second mortgage, and loaned money on real estate contracts and equities. It also purchased contracts. It sold its loans to individual investors. (R. 349-353.)

Merchants Loan & Investment Company. The statement appearing at pp. 37 and 38 of respondents' brief is fairly accurate, except that the record does not contain the statement: "Stockholders in the Central State Bank, Mechanics Savings Bank, Des Moines National Bank, Central Trust Company, Valley National Bank, and Peoples Savings Bank were stockholders in the company." (R. 349-353.)

State Bond Company. The statement on p. 38 of respondents' brief is substantially accurate.

Polk County Mortgage Company. The statement on pp. 38 and 39 is substantially correct.

Guarantee Mortgage & Finance Company. The statement set out on pp. 40 and 41 of respondents' brief is substantially accurate.

National Investment and Finance Company.—Burns Bros. Company. The auditor of this company testified that the National Investment & Finance Company during 1919 made small loans to individuals, secured by stocks and bonds, and made loans to cattle feeders. It continued this business up until July 1920, when the cattle loan business was discontinued. The company purchased, sold, and held mortgage loans on farms in Iowa and a few in the Dakotas, for investment. The name of the company was changed to Burns Bros. Company in the latter part of 1921. The principal business engaged in by Burns Bros. Company was buying bonds of municipalities, selling them, making loans to individuals, making, purchasing, and selling farm mortgage loans. (R. 745.)

United Cattle Loan & Livestock Company. The assistant to the auditor of this company testified that the principal business of the company was making loans on livestock secured by chattel mortgages. The borrowers resided principally in Iowa. The loans were evidenced by notes running for not to exceed six months. The company loaned chiefly on cattle, but made a few loans on sheep. It rediscounted its paper with banks throughout the state of Iowa. Most of the loans were handled through country banks. It did a gross business of around $1,500,000 in 1920. (R. 743.)

The statements set forth on pages 43 and 44 of respondents' brief as to the banking business of petitioner are not accurate. The petitioner's cashier testified that the bank made loans to farmers who stated that they desired the money for the purchase of cattle to be placed and fed on the borrowers' farms. (R. 501.)

With respect to the loans discounted for the Rockford Cattle Paper & Investment Company, the witness Capps, said:

> "We would have made the same type of loans. I couldn't say we would have made all the loans they made, but we did make the same type of loans that they did." (R. 502.)

The last paragraph on page 44 of respondents' brief is not in accordance with the record. The witness Capps testified:

> "In 1919 the Iowa National Bank financed contractors who were engaged in public improvement work. The bank advanced funds to such contractors for the purpose of defraying the expense of the work, having an agreement with the contractors for the purchase at a stated price of public improvement certificates and bonds which they might receive in connection with the work." (R. 464.)

On cross examination the witness testified: "We have a form of such contract that was generally used." (R. 508, 509.)

At the request of counsel for respondents, Exhibit Z-115 was produced, which was an agreement between petitioner and the Empire Construction Company, relating to the financing of an improvement project, wherein petitioner contracted to accept public improvement securities in payment of the advances. (See R. 509.)

We have not attempted to point out all of the inaccuracies found in respondents' so-called "statement of the evidence". In many instances the statements set forth in respondents' brief were qualified by other statements, so that the same do not fairly state the substance of the testimony.

It is well settled that the term "other moneyed capital" includes investments of individuals in notes, bonds, mortgages, and other securities such as normally enter into the business of banking, as well as shares of stock or other interests in corporations, engaged in the loan and investment business in the same field in which national banks make loans and investments.

Thus in *Merchants National Bank v. Richmond*, 256 U. S. 635, this Court said:

> "By repeated decisions of this court, dealing with the restriction here imposed, it has become established that while the words 'moneyed capital in the hands of individual citizens' do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in banking corporations and others that enter into direct competition with those banks. They include not only moneys invested in private banking, properly so called, but investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking."

In *First National Bank of Hartford v. City of Hartford*, 273 U. S. 548, Mr. Justice Stone, speaking for this Court, uses the following language:

> "Our conclusion is that Section 5219 is violated wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business, or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business."

And from another point in the same opinion, we quote:

> "Competition may exist between other moneyed capital and capital invested in national banks, serious in character and therefore well within the purpose of Section 5219, even though the competition be with some but not all phases of the business of national banks. Section 5219 is not directed merely at discriminatory taxation which favors a competing banking business. Competition in the sense intended arises not from the character of the business of those who compete but from the manner of the employment of the capital at their command. No decision of this court appears to have so qualified Section 5219 as to permit discrimination in taxation in favor of moneyed capital such as is here contended for. To so restrict the meaning and application of Section 5219 would defeat its purpose. It was intended to prevent the fostering of unequal competition with the business of national banks by the aid of discriminatory taxation in favor of capital invested by institutions or individuals engaged either in similar businesses or in particular operations or investments like those of national banks."

One of the leading cases on this subject is that of *Mercantile National Bank v. Mayor, etc.*, 121 U. S. 138. In that case this Court, in defining the term "moneyed capital", said:

> "Applying this rule of construction we are led, in the first place, to consider the meaning of the words, 'other moneyed capital' as used in the statute. Of course it in-

cludes shares in national banks; the use of the word 'other', requires that. If bank shares were not moneyed capital, the word 'other' in this connection would be without significance. But 'moneyed capital' does not mean all capital, the value of which is measured in terms of money. * * *

The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital'. Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the Act of Congress. That the words of the law must be so limited appears from another consideration: they do not embrace any moneyed capital in the sense just defined. * * *

The terms of the Act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."

Counsel's theory as to just what capital is "competitive" is somewhat novel, but no extended argument is required to demonstrate its unsoundness in principle. For example, counsel contend that the automobile finance companies cannot properly be said to be "in competition" with banks. These companies are engaged in financing the business of automobile dealers by purchasing from the dealers notes and installment contracts secured by liens on automobiles sold by the dealers to their customers. In some instances the dealer was required to endorse such paper; in other instances the finance companies exacted a large discount and took the paper "without recourse". Petitioner during the four years here in controversy made loans to dealers in automobiles for the purpose of financing their business, and in many instances discounted, with the dealers' endorsement, notes given to the dealers by purchasers of automobiles. (See testimony of J. R. Capps, Record 457-460 inc. 466-467-471-476.) The record even shows that in some instances, petitioner was making loans to the identical dealers from whom the finance companies bought paper.

It is true of course that the *form* of the transaction is not identical in the loans made by Petitioner with the transactions of the finance companies; yet both transactions have the same ultimate purpose—to increase the working capital of the automobile dealer and thus enable him to expand his sales. The earnings or profit to petitioner on such a transaction comes from interest on the amounts loaned, while in the case of the finance companies, the earnings are the interest payments made by the purchaser of the automobile, plus the discount, granted by, or exacted from the dealer. In both cases the object of the business is to make a profit from the use of the business capital as money, and for that purpose the capital of the business is invested in securities, by way of loan, discount or otherwise, which are from time to time

reduced again to money and reinvested. See *Mercantile National Bank v. Mayor, etc., of New York*, 121 U. S. 138.

A reading of the testimony of the witness J. R. Capps will readily disclose that a substantial portion of petitioner's loan business consisted of loans and advances to automobile dealers. It is of course common knowledge that a very large percentage of all the automobiles sold in this country are sold on "time", or deferred payments. A dealer in automobiles may prefer to carry this paper himself, borrowing funds from his banker to enable him to do so, or he may, particularly if the volume of installment payments be large, prefer to turn the transactions over to a finance company who will relieve him of the necessity of looking after collections, and who will carry the risk of defaults in payments in return for a substantial discount. If the finance company is ably managed, builds up a large volume of business, and is able to offer relatively low discount rates it will obviously be favored by the automobile dealer, who will turn over to it all of his installment business, and the national bank may see him no more as a borrower of funds. Yet counsel say that the business of the finance companies is not "competitive" with that of petitioner! We believe Justice Stone had in mind just such situations as are here presented when he said in *First National Bank of Hartford v. Hartford, supra:*

> "With the great increase in investments by individuals, and the growth of concerns engaged in particular phases of banking as shown by the evidence, discrimination with respect to capital thus used could readily be carried to a point where the business of national banks would be seriously curtailed."

Manifestly, automobile finance companies such as the Iowa Guaranty Mortgage Corporation, the Bond and Mortgage Company of Iowa, the Des Moines Morris Plan Company, and the Continental Mortgage & Loan Company, were

carrying on a business of which if extended to its full limits might ultimately deprive all commercial banks of the loan business of dealers engaged in selling automobiles. Consequently, these corporations are in competition with the business of petitioner, and the moneyed capital represented by the shares of such corporations is directly within the prohibition contained in Section 5219 of the Revised Statutes.

On pages 95 and 96 of their brief, counsel for respondents advance substantially the same argument with respect to the so-called "cattle paper". The Record discloses that the United Cattle Loan & Livestock Corporation, the National Investment & Finance Company, the Union Mortgage & Cattle Loan Company, and the Federal Cattle Loan Society made loans to growers or feeders of livestock, secured by chattel mortgages on the animals. (See Record 318-323, 274-280, 743.) J. R. Capps, petitioner's cashier, testified that petitioner made direct loans to its customers to finance the purchase and feeding of cattle. (See Record 463-469-478).

The statement of counsel in respondents' brief, page 96, that "The banks have not testified to a single loan made on the security of cattle." is therefore directly contrary to the Record. It affirmatively appears without dispute that the loaning of funds to growers and feeders of livestock was a substantial portion of the business of national banks in Iowa. On page 630 of the Record is reproduced a tabulation taken from the report of the Comptroller of the Currency, which discloses that on November 15, 1920 national banks in the City of Des Moines had loaned to "farmers, agriculturists, and livestock raisers" more than $9,000,000, while national banks in the smaller communities of the state had more than $137,000,000 invested in similar loans.

The largest of these cattle loan companies was the United Cattle Loan & Livestock Corporation. This one institution in 1920 made loans on the security of cattle to the extent of $1,500,000, many of the loans being sold to banks in Iowa

and elsewhere. Both this company and the Federal Cattle Loan Society got in touch with their prospective borrowers through country banks in Iowa. The statements set forth on page 96 of respondents' brief are therefore incorrect and without support in the Record.

In the case of *Minnesota v. First National Bank of St. Paul*, 273 U. S. 561, this Court directly held that dealers in "cattle loan paper" were in competition with national banks and that capital invested in the cattle loan business was within the restriction found in Section 5219 of the Revised Statutes. We quote from the opinion of Justice Stone, the following:

> "Note brokers within the state in those years made loans to their customers upon paper which they sell to banks and other investors, amounting to as much as $100,000,000 annually. Much of this paper is sold outside of the state, but the amount sold to banks and to individuals within the state is substantial. One class of this paper known as 'cattle loan paper' exceeded $22,000,000 annually in the years in question, and of this $13,000,000 was sold to banks, corporations, firms, and individuals in Minnesota. The amount shown to have been sold to individuals approximated $1,000,000."

No further comment upon our part is needed. It is manifest, of course, from the quotation, that companies directly engaged in the "cattle loan business" are in competition with national banks.

The Security Loan & Investment Company, the Bond & Mortgage Company of Iowa, the Jesse F. Stevenson Company, and the Continental Securities Company were shown to be engaged in "financing public improvement contractors."

On pages 96-98 inclusive of their brief, counsel for the respondents urge that business of this type is not "competitive" with national banks. Petitioner was shown to have been engaged during the four years in question in making loans

to public improvement contractors to enable them to complete their improvements and "took in payment of the advances the bonds and certificates of the municipalities with which the contractors were dealing. In 1920 at least $170,000 of such loans were made." (Rec. 470.) It continued such business through 1922. (Rec. 479.)

As in the case of the automobile finance companies, there were slight differences in the methods adopted by the various companies engaged in financing these contractors. For that matter, there are differences in the financing methods of banks. One bank may require a larger measure of security than another or extend greater credit on the same security. Can it be that such facts alone render their business non-competitive in character? The Record shows without dispute that petitioner was engaged in the business of making loans to public improvement contractors in the identical field in which these finance companies operated. Hence, within the rules laid down by this Court, the business of the bank and the business of the finance companies were in competition, and the moneyed capital of the finance companies is within the restriction imposed by Section 5219.

Counsel also urge that the stock of mortgage loan companies, and real estate mortgages made for the purpose of investment by individual citizens do not constitute "moneyed capital" within the meaning of Section 5219 of the Revised Statutes. In support of ths position they cite the decision of the Iowa Supreme Court in *First National Bank v. Anderson*, 196 Iowa 587. We are at loss to understand just why counsel should cite this case as an authority, because the case was reversed by this Court. (See 269 U. S. 341.) In that case this Court, speaking by Justice Van Devanter, in referring to the allegations of the complaint, said:

> "No doubt they (the allegations of petition) are broad enough to include farm mortgages; but this does not weaken the allegation of completion, for while na-

tional banks were formerly prohibited from making loans on real estate (citing cases), the prohibition was partly withdrawn and much of that field was opened to such banks by the Acts of December 23, 1913, chap. 6, 38 Stat. at L. 273, and September 7, 1916, chap. 461, 39 Stat. at L. 754."

This Court again considered the subject in *First National Bank of Hartford v. Hartford*, 273 U. S. 548 at p. 560, where, speaking by Justice Stone, it said:

> "They are authorized, with certain limitations, to loan money on real estate mortgages. Act of December 23, 1913, *supra;* Act of September 7, 1916, *supra;* Act of February 25, 1927, sec. 24. Here plaintiff is shown to have investments in real estate mortgages and to be engaged in selling them. The sale of mortgages and 'other evidences of debt' acquired by way of loan or discount with a view to reinvestment is, we think, within the recognized limits of the incidental powers of national banks. *Compare First Nat. Bank v. Anderson*, 269 U. S. 348, 70 L. ed. 303, 46 Sup. Ct. Rep. 135; *Mercantile Nat. Bank v. New York*, 121 U. S. 156, 30 L. ed. 902, 7 Sup. Ct. Rep. 826. To that extent the business of acquiring and selling such mortgages and evidences of debt, carried on by numerous individuals, firms, and corporations in Wisconsin, comes into competition with this incidental business of national banks. That the exercise of this incidental power has become of great importance in the business of national banks appears from the Report of the Comptroller of the Currency for 1924, 44 *et seq.*, showing that approximately one-third of the investment of national banks consists of government, railroad, public service corporation and other bonds, and 'collateral trust and other corporation notes.'"

In this case it affirmatively appeared from the Reports of the Comptroller of the Currency offered in evidence that national banks in the City of Des Moines, and in Iowa, made loans on real estate mortgage security. Thus, on page 628 of the Record it appears that national banks in the City of Des Moines on June 30, 1919 held $110,000 secured by im-

proved real estate under authority of Section 24, Federal Reserve Act as amended, while national banks in Cedar Rapids, Dubuque, and Sioux City held such loans to the extent of $1,000,000. "Country banks" in the smaller communities in Iowa held such loans to the extent of $3,192,000 on that date. On June 30, 1920 (Record p. 635) national banks in Cedar Rapids, Iowa, held such loans to the extent of $1,307,000, national banks in Des Moines to the extent of $273,000, and the smaller banks held $3,793,000 in such loans. On June 30, 1921, (see Record p. 638), national banks in Des Moines held $68,000 in such loans secured by farm mortgages, while national banks in Cedar Rapids, Dubuque, and Sioux City, held more than $1,000,000 of such paper, and country banks held such loans to the extent of $3,264,000.

It affirmatively appeared that petitioner from time to time purchased and carried real estate loans without endorsement for insurance companies, banks, and other customers. The making of real estate mortgage loans secured by first liens on farms or city property is an important part of the business of banking as carried on in Iowa during the four years in controversy. Companies engaged in making such loans were, therefore clearly in competition with petitioner within the rules established by decisions of this Court.

Counsel for the respondents developed on cross examination that many of the companies engaged in the loan and investment business borrowed money from banks in the City of Des Moines, including petitioner. They seem to feel that this fact establishes that there was no competition between banks and the finance companies. Much of their argument with respect to "competition" is predicated on the theory that no institution with which banks had friendly dealings can be regarded as in competition.

This same argument was urged before the Circuit Court of Appeals for the 8th Circuit in the case of *Munn v. Des*

Moines National Bank, 18 Fed. (2d) 269. Circuit Judge Sanborn disposed of the contention in these words:

> "Counsel argue that the decrees below should be reversed, because the banks are estopped from maintaining their suit by the fact that they loaned money to some of their competitors in Polk County. But we discover nothing in that fact, if it existed, which in any way estops them from maintaining the suits before the court below and before us. The objection to the decrees on that account is in our opinion untenable."

The record discloses that petitioner loaned money to other banking institutions in the City of Des Moines and elsewhere. According to counsel for the respondents, this conclusively establishes that petitioner was not in competition with the banks to which loans were made. Such position, it seems to us, is little short of absurd. In *First National Bank of Hartford v. Hartford, supra*, it appeared that one of the principal companies, which was accorded a more favorable basis of taxation than complainant, was affiliated with, and its stock held by stockholders of the First Wisconsin National Bank of Milwaukee; yet the shares of this company were held to be moneyed capital. If shares of such a corporation are competitive with other national banks within the meaning of Section 5219, surely the mere fact that the companies engaged in the loan and investment business in the City of Des Moines found occasion to borrow funds from banks in Des Moines does not render the capital employed in such enterprises non-competitive.

In the instant case the evidence on behalf of petitioner showed that large amounts of money were loaned by individual investors in the same territory in which petitioner engaged in making loans. In several instances it was shown that officers and employees of various companies made loans to the companies. In *Minnesota v. First Nat. Bank of St. Paul*, 273 U. S. 561, Justice Stone, in discussing the character

of the moneyed capital shown by the record in that case, said: "Eleven business concerns to whom respondent made loans borrowed from their own officers and employees in one of the years in question about $1,500,000."

We have not included in our proof purchase money mortgages, accounts, or money on deposit in banks. We have confined the evidence to loans and investments by individuals in securities such as normally enter into the business of banking, together with evidence as to the business activities of corporations engaged in the loan and investment field in which petitioner was engaged. We believe that the record in the instant case discloses the existence of large and material amounts of moneyed capital, and that the direct character of the competition is more clearly disclosed than in the cases of *First National Bank of Hartford v. Hartford*, and *Minnesota v. First National Bank of St. Paul, supra.* The evidence, we submit, establishes with greater particularity the existence of moneyed capital in competition with the petitioner than in either of the cited cases, and for that matter, than in any of the cases determined by this Court within the past fifteen years, including the cases of *Merchants National Bank v. Richmond*, 256 U. S. 635; *Montana National Bank v. Yellowstone County*, 276 U. S. 499, and *Commercial National Bank of Miles City v. Custer County*, 275 U. S. 502, in which the decision of the Montana Supreme Court was reversed on the authority of *First Nat. Bank of Hartford v. Hartford.*

We submit, therefore, that the record abundantly discloses the existence of large and material amounts of moneyed capital within the meaning of Section 5219 of the Revised Statutes which were taxed at discriminatory rates. We believe that the majority of the Supreme Court of Iowa concede the existence of such moneyed capital; but even though the opinion be construed otherwise, under the record no other conclusion can be arrived at. The contention of coun-

sel for respondents is directly contrary to the prior decisions of this Court, and surely cannot be sustained.

IV.

By Proposition IV in respondents' brief (Page 119 to 121) it is contended that since the claimed unlawful and unconstitutional discrimination arose out of the administration of the tax laws of the State of Iowa, rather than because of the terms of such laws, petitioner may not have relief unless it can show that its actual competitors, and not its possible competitors, have been favored by lower rates of taxation. As supporting this contention, respondents rely upon the decision of the Iowa Supreme Court in the case of *First National Bank of Guthrie Center v. Anderson*, 196 Iowa 587, which case was by this Court reversed. See *First National Bank v. Anderson*, 269 U. S. 341.

But, aside from the fact that the case relied upon has been reversed by this Court, the contention is not only unsound, but is opposed to other decisions of this Court. In *First National Bank of Hartford v. Hartford*, 273 U. S. 548, at 559, it is said:

> "We do not conceive that in order to establish the fact of competition it is necessary to show that national banks and competing investors solicit the same customers for the same loans or investments. It is enough, as stated, if both engage in seeking and securing in the same locality capital investments of the class now under consideration which are substantial in amount".

Furthermore, as we have hereinbefore pointed out, the record abundantly shows that there was in each of the years involved in this case, in the same taxing district as petitioner, capital which was seeking and securing investments of the class under consideration in the same locality in a substantial amount, and, indeed, in some instances was seeking

and securing investments from identical parties to whom petitioner was loaning money.

V.

By Proposition V of respondents' brief (Pages 121 to 123) it is contended that all of the corporations, the assessment of whose capital stock was changed by the County Auditor of Polk County so as to subject it to a grossly favored rate of taxation when compared to the assessment of the shares of stock of petitioner, must be excluded from consideration because Section 5219 of the Revised Statutes forbids discrimination as to taxes on "moneyed capital in the hands of individual citizens", the argument being that corporations are not individual citizens, and that the statute forbids such discrimination only as to capital in the hands of individuals.

First, it will be noted that under the laws of Iowa (Section 1310, Code Supp. 1913; Appendix to Petitioner's Brief, Page 84) corporation shares of stocks are assessable and the tax imposed thereon collectible from the owner thereof, so that the holders of such corporation shares of stock are individual citizens within the meaning of Section 5219; and, next, this question has been definitely determined by decisions of this Court. In the case of *Mercantile National Bank v. Mayor*, 121 U. S. 138, it is said:

> "The terms of the Act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money."

To the same effect see *Evansville National Bank v. Britton, Treasurer*, 105 U. S. 322; *Merchants National Bank of Richmond v. Richmond*, 256 U. S. 635; *First National Bank of Hartford v. Hartford*, 273 U. S. 548.

VII.

By Proposition VII in respondents' brief (Pages 123 to 128) it is contended that different classes of people or property may be taxed at different rates if there is a reasonable classification under the Constitution of the State of Iowa, and that the administrative officers of the State and its subdivisions had the right to decide which particular class should be taxed in one manner and which in another, and that the taxation of the property complained of was not shown to be so similar to banks that to put it in another class for the purposes of taxation would be purely arbitrary classification.

There is no question of the power of the State of Iowa, through its legislature, to validly adopt reasonable classifications of property for the purposes of taxation under the State Constitution. The legislature of the State, by the enactment of Section 1310, Code Supp. 1913 (Appendix to Petitioner's Brief, Page 84), has exercised this power of classification and has provided:

> "All moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States shall be listed and assessed against the owner thereof at his place of business, and if a corporation, at its principal place of business, at the same rate as state, savings, national bank, and loan and trust company stock is taxed in the same taxing district and at the actual value of the moneyed capital so invested."

Thus, it will be seen that there is no room for this contention of respondents, because the legislature of the State of Iowa, acting within its constitutional powers, has expressly made the classification, and the record shows that regardless of this act of the legislature large and substantial amounts of such moneyed capital have been by the administrative officers of the State deliberately, intentionally, habitually, and

generally subjected to a grossly favorable and discriminatory rate of taxation. Certainly it cannot be that an administrative officer of the State has the power to classify property for taxation against the express and direct mandate of the acts of the legislature of the State, for it is the function only of the administrative officers to enforce and apply the laws of the State, and not to make them.

It is worthy of note in this connection that the Supreme Court of the State of Iowa in its decision paid no heed to this contention, but even the opinion of the majority of that Court is predicated upon the assumption that there had been a valid classification of property subject to taxation by the act of the legislature of the State of Iowa which was controlling.

VIII.

By Proposition VIII of respondents' brief (Pages 128 to 132, inclusive) it is contended that the act of the county auditor of Polk County, Iowa in habitually, wilfully, intentionally, systematically and generally taxing a large and substantial amount of moneyed capital at a grossly favorable and discriminatory rate in each of the years in question, was contrary to the laws of the State of Iowa, and as such constituted a violation of the laws of that State, and, that it rests solely with the Courts of Iowa to correct such violation of its laws, and that therefore no constitutional or federal question can arise therefrom. The case of *Barney v. New York*, 193 U. S. 430-8, is relied upon as supporting this contention.

Insofar as the case of *Barney v. New York, supra*, may seem to adopt the principle that an act invalid by a state law cannot be regarded as the act of the State, and that hence no federal question is involved, it must be regarded as overruled by *Raymond v. Chicago Union Traction Company*, 207 U. S. 20 and *Home Telephone and Telegraph Co.*

v. Los Angeles, 227 U. S. 278, where it is, among other things, said:

> "If there were room for such conclusion in view of what we have said, it would be our plain duty to qualify and restrict the *Barney* case insofar as it might be found to conflict with the rule here applied."

In respondents' argument under Proposition VIII it is said that petitioner has seized upon the phrase and fact that the officers of Polk County, State of Iowa, charged with the administration of the tax laws, did in each of said years "habitually, intentionally, wilfully, systematically and generally assess petitioner's competitors in the alleged improper manner complained of for the reason that this is a mystic shibboleth which the United States Courts have fixed upon in order to be able to say that the *administration* of the law as distinguished *from the law itself* is in contravention of the provisions of Section 5219 of the Statutes of the United States."

We think counsel have wholly misconceived the theory of petitioner's action in this respect. This Court, in repeated cases, has laid down the rule that the intentional and systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. This is no catch word or phrase of the Federal Courts, as the brief of respondents asserts, but is a doctrine firmly established and settled by repeated decisions of this Court. See

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362.
Sunday Lake Iron Company v. Wakefield, 247 U. S. 350.
Cummings v. Merchants Nat'l Bank of Toledo, 101 U. S. 153.
Raymond v. Chicago Union Traction Company, 207 U. S. 20.

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441.

Taylor v. L. & N. R. R. Co., (C. C. A.), 88 Fed. 350.

It is further argued under Proposition VIII in respondents' brief that the county auditor testified that in making the changes and classification, he acted in good faith and in the belief that he was assessing the corporations as they should be assessed under the law, and that this would show that there was no habitual, wilful, intentional, systematic, or general attempt on his part to violate the law, or to create improper discrimination as against the plaintiff national bank.

It is not necessary that such intentional, habitual, systematic, and general acts were meant by such taxing officials to injure the petitioner, for, as said by Justice Taft in *Taylor v. L. & N. R. R. Co.*, (C. C. A.) 88 Fed. 350:

> "It is true that it must appear that the taxing officers whose acts of undervaluation created the unjust burden, must intentionally and habitually violate the law by assessing property at a less valuation than that which they know to be the true value, but *it is not true that they must be shown affirmatively to intend to injure complainant and his class of taxpayers in so doing.*" (Italics ours.)

We therefore submit that the contentions advanced in connection with Proposition VIII of respondents' brief are not sustainable.

IX and XI.

By Propositions IX and XI in respondents' brief (Pages 132 to 138) it is contended that petitioner is precluded from relief by reason of an adjudication, laches, and estoppel.

The same contentions were advanced in the Supreme Court of Iowa, and while the majority opinion does not predi-

cate its conclusions thereon in any degree, the minority fully answer and deny the same. (Record, pages 1387-1388).

The argument advanced is so confused that we are unable to determine just what facts are relied upon as establishing one of these defenses rather than the other, but we shall treat them in the order in which they are stated.

Concerning the plea of former adjudication, reference is made to certain appeals prosecuted from the Board of Review by the Iowa National Bank and Central State Bank. It appears that in the years 1919 to 1921, inclusive, the Iowa National Bank and Central State Bank prosecuted appeals from the Board of Review involving the claimed right of the banks to deduct the par value of Liberty bonds held by them from the amount of the assessment of their shares of stock. In the year 1919 the appeals from the Board of Review were tried, and judgments rendered in the District Court of Polk County, Iowa canceling the assessments upon the shares of the bank's stock, and a stipulation was entered into by counsel under the terms of which it was provided that the Iowa National Bank and the Central State Bank cases should abide the result of the appeal to the Supreme Court in the similar case known as *Des Moines National Bank v. Fairweather, et al.* The *Des Moines National Bank* case was appealed, and the judgment of the Polk County District Court was reversed. A writ of error was prosecuted to this Court to review the judgment of the Supreme Court of Iowa, and that judgment was affirmed. The Iowa National Bank and the Central State Bank commenced suits in equity in the United States District Court of Iowa to enjoin the collection of taxes upon their shares of stock for the four years in question in excess of the five mill rate. These suits in the Federal Court were based on substantially the same facts now relied upon by the banks.

Appeals from the Board of Review for the years 1920 and 1921 were never tried nor determined, but were volun-

tarily dismissed. Respondents now urge that these proceedings constitute a bar to the maintenance of the present suit. An examination of the proceedings in the case of *Des Moines National Bank v. Fairweather*, 263 U. S. 103, will readily disclose that the questions now urged were never brought before the courts in that case at all. The questions were not raised, they were not considered, and therefore that case constitutes no adjudication. It is a well settled rule that a judgment in a prior action between the same parties operates as an adjudication or an estoppel only as to those matters in issue, upon the determination of which a finding was rendered.

In *Cromwell v. County of Sac*, 94 U. S. 351, 24 Law ed. 195, it appeared that bonds of Sac County, Iowa, had been delivered to a contractor in payment for public improvements. One of these bonds ultimately came into the hands of one Smith. Smith sued on one of the interest coupons but failed to show that he was a bona fide purchaser for value, and as the bonds were fraudulent, the Iowa court ruled that Smith was not entitled to recover. Cromwell became the assignee of some of the bonds held by Smith, and brought action upon them, and it was contended that the action by Smith constituted an adjudication. This Court in passing upon the question said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other

admissible matter which might have been offered for that purpose. Thus, for example; a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action,—and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

See also:

United Shoe Mach. Co. v. United States, 258 U. S. 451, 66 Law ed. 708.

Radford v. Myers, 231 U. S. 725, 58 Law ed. 454.

Alt v. Young, 181 Iowa 1260.

Nesbit v. Independent District of Riverside, 144 U. S. 610; 36 Law ed. 562.

The identical defense now urged was urged in the case of *Munn v. Des Moines National Bank*, 18 Fed. (2) 269 but the Circuit Court of Appeals found it untenable. In the opinion by Circuit Justice Sanborn, it is said:

"Another contention of counsel for the treasurer is that these banks did select and pursue the remedy offered to them by section 1373 to establish the causes of action pleaded in this suit and that in those proceedings those causes of action were finally adjudged against them. In the consideration of this claim we take the case of the Des Moines National Bank and the year 1919 because they are typical of the facts in all the cases in hand. * * *

Nor did this petition contain any prayer for any relief on account of the taxation of this competitive moneyed capital or the use of it. The board of review allowed a deduction of $62,000 from the total amount of the capital, surplus and undivided earnings of the bank assessed on account of the bank's obligation based on its indebtedness to the stockholders of the German Savings Bank, and granted no other relief. Thereupon the bank filed a petition in the district court of Polk County, Iowa, against the members of the board of review in which it repeated the averments made in its petition to the board with the exception of the averments about the $62,000. This second petition, however, contained no averment of the amount of moneyed capital of any party or person used or usable in 1919 in competition with the moneyed capital of the bank, or of the aggregate thereof, and its prayer was that the assessment of the bank's property be lowered to the extent of the par value of the securities issued by the United States owned by it on January 1, 1919, and by the amounts of those owned by it for sixty days prior to December 1, 1918, and for such further relief as to the court should seem meet. It contained no prayer for any relief on account of the discriminatory taxation of competitive moneyed capital and no averment of the amount or value of such capital or any part of it. The defendants demurred to the petition, the district court sustained the demurrer, the bank appealed to the Supreme Court of the State, that Court reversed the judgment of

the district court, and the plaintiffs appealed to the Supreme Court of the United States and that court affirmed the judgment of the Supreme Court of Iowa. *Des Moines National Bank v. Fairweather*, 191 Iowa, 1240, 1253, 1254, 181 N. W. 459, 184 N. W. 313; *Des Moines National Bank v. Fairweather*, 263 U. S. 103, 105, 114, 116, 44 S. Ct. 23, 68 L. Ed. 191. But those courts did not consider, discuss, or decide the question whether the petition stated any cause of action on account of discriminatory taxation between the shares of the bank and the moneyed capital in the hands of individual taxpayers used in competition therewith. * * *

The claim of counsel is that by the proceedings of this bank in its former case, the cause of action pleaded and tried in this suit was pleaded and adjudged against the bank. The test of the identity of causes of action is the identity of the facts essential to maintain them. *Harrison v. Remington Paper Co.*, (C. C. A.) 140 F. 385, 400, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; *Union Central Life Ins. Co. v. Drake*, (C. C. A.) 214 F. 536, 545; *Pierce v. Nat'l Bank of Commerce*, (C. C. A.) 268 F. 487, 496. Because in that former proceeding instituted before the board of review and continued in the state court the bank did not plead the amount of other moneyed capital in competition with the business of the bank held by any of the parties it named in its pleadings, or the aggregate amount they so held, because in those proceedings the bank did not pray for any relief on account of discrimination against it by the taxation of competitive moneyed capital, because it did not prove any such discrimination, and because, if any evidence of discrimination in taxation could have been lawfully received under those former pleadings, and we are of the opinion that none could have been over proper objection, radically different evidence and a very large amount of it was indispensable to sustain the cause of action in this case, our minds have been forced to the conclusion that this bank was not estopped by its former proceedings from commencing and prosecuting to a favorable decree the cause of action pleaded by it in this suit."

This was a determination by the Circuit Court of Appeals of the Eighth Circuit, under the very facts disclosed

here, that the proceedings, which counsel contend constitute an adjudication of this controversy, would not bar a suit in equity to enjoin the collection of the taxes. Further citation of authority on this proposition seems unnecessary.

On Page 135 of respondents' brief it is said, with regard to the dismissal of the cases seeking injunctions against the collection of the taxes:

> "If this does not constitute an adjudication, it certainly would constitute estoppel and laches on the part of these petitioners."

No authority is cited for this novel proposition. It is a fundamental rule recognized in Iowa that the voluntary dismissal of an action by complainant does not constitute an adjudication of any of the matters at issue in the pleadings. See

Newberry v. Newberry, 114 Iowa, 704.
Brown v. Holden, 120 Iowa, 191.
Atkins v. Anderson, 63 Iowa, 739.

It is further contended by respondents that the petitioner was guilty of laches which will bar its claim. The only cases cited in support of this contention are the cases of *Slimmer v. Chickasaw County*, 140 Iowa, 448, and *Farmers Insurance Co. v. Linn County*, 202 Iowa 444. The facts in the case of *Slimmer v. Chickasaw County* were that a property owner listed his property for taxation in one county. Subsequently a tax ferret discovered that he had been a resident of another county, and a compromise settlement of his claim of liability to taxation in the second county was made. Subsequently the plaintiff sued to recover the money paid in carrying out this settlement. It was held that he could not recover the money so paid in an action at law against the county.

It is not contended here that the county officers changed their position in reliance upon any action or lack of action on the part of petitioner. It is not denied that the county officers were at all times advised that the banks were claiming that the taxes were illegal, and that the officers were without authority to exact them. Consequently there is no basis for the equitable plea of laches, nor does the claim of estoppel find support in the record. It must be borne in mind that the litigation involving the right to the deduction of liberty bonds and other federal securities was not finally determined until November, 1923. Claims for refund were filed in approximately one year and nine months after the payment of the taxes. It seems to us quite apparent there is no basis in this record for a plea of laches or estoppel, and we do not believe that counsel for the respondents seriously contend to the contrary.

Where taxes are void or illegal, a taxpayer is not required to resort to all remedies which might possibly be available to him before payment of the taxes. He has the legal right to rely upon Section 7235 of the Code and to pay the taxes and to bring proper proceedings to procure a refund thereof.

See *Dickey v. County of Polk*, 58 Iowa, 287, where the Supreme Court of Iowa said:

> "Before payment of the illegal taxes the law secures other remedies to the taxpayer. He may appeal from the action of the court of equalization, as in *Getchell v. Supervisors, supra,* and *Ingersoll v. Des Moines,* 46 Iowa 553, or he may invoke the aid of a writ of certiorari, as in *Royce v. Jenney, et al.,* 50 Iowa 676. But he could gain no relief by these remedies after payment of the taxes. They are intended to protect him from the enforcement of the taxes by collection. When the taxes have been paid his only remedy is by action to recover them back. His failure to pursue remedies to arrest the collection of the taxes, does not waive or forfeit his right to bring such an action. The obvious

purpose of Code, section 870, is to give a remedy by action to recover for taxes paid which the taxpayer could not have been compelled to pay."

X.

By Proposition X in respondents' brief (Pages 138 to 141) it is contended that the taxes involved were not void or illegal within the meaning of Section 1417, Code of Iowa, 1897 (Appendix to petitioner's brief, Page 90), and that the payments were voluntary, which precludes relief to petitioner.

Again we may point out that the majority opinion of the Supreme Court of Iowa is not based upon this contention in any degree, although it was presented, and also that the minority opinion (Record, Page 1392) completely answers and denies this contention.

Furthermore, we have already seen in the consideration of the facts disclosed by this record that the taxes are void, not merely irregular, nor does the record disclose that counsel's contention with respect to the voluntary character of the payments is true in point of fact. At the time of the payments by the petitioner, actions in equity were pending against the county treasurer involving the same questions upon which this suit is based. The tax receipts were all endorsed "Paid under Protest". What more was required on the part of the petitioner to enable it to invoke the rights given by said Section 1417 of the Iowa Code? Under the decisions of the Supreme Court of Iowa no particular protest is necessary in order to preserve the rights of a taxpayer to a refund under this Section. In fact, that Court has frequently held that where the payment of taxes was entirely voluntary, such fact presented no obstacle to a refund under the law. Such was the holding in *Lawman v. Des Moines County*, 29 Iowa 310; *Richards v. Wapello County*, 48 Iowa 507; *Dickey v. County of Polk*, 58 Iowa

287; *Commercial National Bank v. Board of Supervisors*, 168 Iowa 501. In the case last cited the Court said:

> "The taxes were voluntarily paid as contended, but this furnishes no objection to refunding under this statute."

Nor is it true, as contended by respondents, that payment of the taxes without a specific protest waives the taxpayer's right to demand a refund in all cases except where the whole tax is void *in toto*.

The case of *Hawkeye Company v. Marion*, 110 Iowa 468, cited by counsel, is inapplicable. That case involved a special assessment for the construction of a sidewalk, and the holding was that a property owner who voluntarily pays the amount of his assessment cannot sue the town for its recovery. The refund statute is inapplicable to special assessments.

Furthermore, as pointed out in petitioner's previous brief, the payment of the taxes was under compulsion and to avoid the imposition of additional large penalties, and under such circumstances it has been clearly established by the decisions of this Court that relief may be had.

See

Carpenter v. Shaw, 280 U. S. 363.
Ward v. Love County, 253 U. S. 17.

XII.

By Proposition XII in respondents' brief (Pages 141 to 148) it is contended that the petitioner has not come into equity with clean hands: first, because some of the banks sold real estate mortgages and did not require the purchasers to record assignments thereof; and, second, because petitioner and other banks, either directly or indirectly, through an organization known as the Des Moines Clear-

ing House Association, decreased the amount of interest which such banks paid upon savings deposits, and installed a charge for carrying small accounts, which actions, it is claimed, were contrary to public policy.

Again we may point out that the majority opinion of the Iowa Supreme Court paid no heed to this contention, while the minority, in speaking of this question, said (Record, 1393):

> "The appellees argue that the appellants have not come into court 'with clean hands'. We find nothing in the record of any conduct on their part in connection with the matter in litigation which is unconscionable or such as to bar them from their legal and equitable rights."

There is no room for the application of the equitable maxim resorted to in connection with this proposition for the reasons: First, because there is no proof of any inequitable or unconscionable conduct on the part of any of the banks or their officers; second, because there is no legal duty on the part of the seller of a note or mortgage to require the purchaser to record his assignment; third, because the legal duty rests upon the owner of any such mortgage, whether purchased from a bank or not, and whether an assignment thereof is recorded or not, to furnish the assessor upon demand a full and complete itemized sworn statement showing the amount of moneyed capital so used (Section 1310, Iowa Code; Appendix, Petitioner's Brief, Page 84); and, fourth, because the maxim refers only to the identical transaction under inquiry by the Court, and will not be extended to include the general moral status or conduct of a plaintiff seeking equitable relief.

It is not contended that any officer of petitioner, or of other banks in Des Moines, in the years in question advised purchasers not to record their assignments of mortgages, nor

is there any evidence that a penny in tax money was lost to the State or its political subdivisions because of the failure of the officers of the banks to require that assignments of mortgages be placed of record.

The fact that petitioner was a member of the local clearing house, and the further fact that the clearing house banks some years subsequent to the time involved in this case decreased the rate of interest which was paid upon savings deposits to their depositors, or installed a charge for carrying small accounts, are urged as a basis for the holding that petitioner was a party to an illegal combination, monopoly, or trust, contrary to the public policy of the State; and in Brief Point XII a citation to Corpus Juris is relied upon as sustaining this contention. Certainly it requires no argument to demonstrate the fallacy of this contention. Nothing involved in this suit is influenced in the slightest degree by the rate of interest paid to savings depositors, nor the charge for the expense incident to carrying small accounts, and certainly it is beyond any reasonable conception that such acts would constitute a combination such as prohibited by the laws of Iowa with respect to monopolies and trusts.

XIII.

By Proposition XIII of respondents' brief (Pages 148 to 154) it is contended that the petitioner is not a proper party, and that the suit should have been brought by the individual stockholders of petitioner.

Again, it will be noted that the decision of the majority of the Iowa Supreme Court is not based upon this contention, nor was any consideration given thereto by the majority. On the other hand, the question was considered, answered, and denied by the minority in so convincing a way that we take the liberty of calling to the Court's attention

the following quotation from its opinion: (Record, 1388 to 1392)

> "Another contention of the appellees is, that the banks are not the proper parties plaintiff, or that there is a defect of parties, because the share holders are not joined. This contention of the appellees is also devoid of merit. See Section 1325 of the Code of 1897; *Kennedy v. Citizens National Bank*, 128 Iowa 561; *Fourth National Bank v. City of Boston*, 300 Fed. 29; *First National Bank v. Achenbach*, (Okl.) 237 Pac. 574; *McFarland v. Central National Bank*, 26 Fed. (2d) 890; *Hannan v. First National Bank of Council Bluffs*, 269 Fed. 527; *First National Bank of Watertown v. Eddy*, (S. D.) 198 N. W. 554; *National Bank of Commerce v. City of New Bedford*, (Mass.) 29 N. E. 534; *State National Bank v. City of Memphis*, (Tenn.) 94 S. W. 606; *Home Savings Bank v. Morris*, 141 Iowa 560; *Fort Madison Security Company v. Maxwell*, 202 Iowa, 1346; *Cummings v. Merchants Natl. Bank*, (U. S.) 25 L. Ed. 903.
>
> The evidence shows, without dispute, that the banks actually paid the taxes out of their own funds and no recoupment has been made from the shareholders—no dividend has been declared out of which the taxes were paid.
>
> Section 1325 of the Code of 1897, provides, in substance, that the bank shall be liable for the payment of the taxes assessed to the stockholders of such corporation.
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> In *Kennedy v. Citizens National Bank*, 128 Iowa 561, the plaintiff, a stockholder, brought action against the bank to recover an alleged dividend due the stockholder. The bank had paid the taxes from its own funds, but made no allowance therefor in the payment of dividends. The plaintiff brought suit on the theory that the payment of the tax constituted a declaration of a dividend. This court in the determination of the case, made the following pronouncement:
>
> > 'The defendant bank, as was its duty, paid the taxes levied against the shares of stock from 1892 to 1898, inclusive, but neglected to retain the respective amounts from the dividends subsequently declared, or to enforce the lien thereof against the

stock, as permitted by statute. See section 819, Code 1873 (section 1325, Code 1897). * * * The taxes were paid by the bank, as agent of the stockholders, in pursuance of statutes so requiring; and under the Code of 1873 it had the right 'to retain so much of any dividend belonging to any shareholder as shall be necessary to pay any taxes levied upon his shares'; and under the Code 'the corporation may recover from each stockholder his proportion of the taxes so paid, and shall have a lien on his stock and unpaid dividends therefor. If unpaid dividends are not sufficient to pay such tax, the corporation may enforce such lien on the stock by public sale of the same', etc. These claims for the repayment of the taxes, then, were assets of the bank. It had the right to collect them the same as any other indebtedness owing it, and from its omission or neglect to do so no liability in favor of any individual stockholder arose. As said, the debt belonged to the bank, and not to him, and under all the authorities he may not maintain an action thereon for his own benefit.'

In *McFarland, County Treasurer v. Central National Bank of Topeka*, 26 Fed. (2d) 890, a demurrer to the petition on the ground that the bank could not maintain the action because the stockholders were necessary parties and the only proper parties plaintiff was overruled, the court declaring:

'The pleadings of the bank clearly alleged these facts which have been stated and others. The defendants demurred to these pleadings, the court below overruled their demurrer, and their counsel contends that there was error in this ruling, because the bank was not the real party in interest in this action and its shareholders were.

But these defendants in this case are in no position to invoke the protection of the statute, which requires actions to be brought by the real party in interest, because the prosecution by the bank of this action and its recovery from the defendants of this $12,477.26, which the bank paid to them, will protect them from any future suits or claims to that fund by any other party. The purpose of the stat-

ute is not to allow defendants to demand the adjudication of equities which exist wholly between the plaintiff and third persons, and that purpose is fully attained, so far as the defendants are not shut out from their proper defenses and counterclaims, and will be fully protected by the judgment, whether for or against the plaintiff, in the event of any other claim on the same cause. * * * The defendants cannot be heard to maintain this dog in the manger defense.

Nor, if it were heard, could the defendants sustain it. Section 79-1101 of the Revised Statutes of Kansas provided that the president, cashier, or other managing officer of this bank should furnish the assessing officer during the month of March in each year a list of all its shareholders and of the number of shares owned by each shareholder, and a statement under oath correctly showing the amounts of capital stock, surplus and undivided profits of the bank as of March 1st of each year, and that it shall pay the tax assessed upon the shares of stock and shall have a lien thereon until the same is satisfied: Provided, that if for any reason the taxes levied upon the shares of stock shall not be paid by the institution, the property of the individual shareholders shall be held liable therefor. * * *

To prevent the seizure and sale of the property of the shareholders in payment of these illegal taxes until after a judicial decision of the question of their legality could be procured, the bank paid this $12,477.26 to the defendants. The shareholders did not pay it; there is no evidence that they ever reimbursed the bank for its payment. The defendants received this money and still have it. They have no legal or equitable right to it, or interest in it, and in law and equity they ought to pay it back to the bank, and we are of the opinion that the bank is the real party in interest in this action, and can maintain its action for it, and recover it from the defendants. *Cummings v. National Bank*, 101 U. S. 153, 156, 25 L. Ed. 903; *Hannan v. First National Bank*, (C. C. A.) 269 F. 527, 530; *First Nat. Bank v. City of Hartford*, 273 U. S. 548, 47 S. Ct. 462, 71

L. Ed. 767; *Ranchmen's Trust Co. v. Duncan*, 114 Kan. 308, 310, 219 P. 523.'

In *Fourth National Bank v. City of Boston*, 300 Fed. 29, we find the following pronouncement:

'It seems to be conceded that an action may properly be brought by the bank as the statutory tax-paying representative of the shareholders'. (Citing numerous cases.)

In *Hannan v. First National Bank of Council Bluffs*, 269 Fed. 527, it was held that since the bank is made liable for the payment of the taxes assessed to its stockholders, a pecuniary liability is imposed on the bank for the payment of the total amount of the tax imposed on all its stockholders, and that it (the bank) is the real party in interest in a suit brought to enjoin the collection of the taxes.

In *Cummings v. Merchants National Bank*, (U. S.) 25 L. Ed. 903, it was contended that a National Bank could not, as plaintiff, bring an action in equity to enjoin the collection of taxes upon its shares of stock levied in violation of Section 5219 of the Revised Statutes. The court in disposing of this contention said:

'In paying the money it is acting in a fiduciary capacity as the agent of the stockholders; an agency created by the Statute of the State. If it pays an unlawful tax assessed against its stockholders, they may resist the right of the bank to collect it from them. The bank, as a corporation is not liable for the tax, and occupies the position of stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends and subject itself to litigation by doing so, or refuse to obey the laws, and subject itself to suit by the State. It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it.'

Other quotations of similar nature could be made from the foregoing authorities, but we deem it unnecessary. As hereinbefore stated, the banks paid the taxes out of their funds, and no dividends have been declared out of which these taxes were paid. It is quite clear that the claims for a refund are assets belonging to the banks, and that they are the proper plaintiffs in these causes of action."

By Proposition XIV in respondents' brief (Pages 155 to 157) it is contended that if the petitioner had been assessed at the rate of five mills on the dollar on all its moneys and credits, the tax would have been much more than the amount that it was compelled to pay.

In order to sustain this position it is contended that the amount of the moneys and credits of petitioner must be computed without the deduction of debts, although under Section 1311, Code of Iowa, in force at the times involved in this case, it was provided:

"In making up the amount of moneys or credits which any person is required to list, or to have listed or assessed, including the actual value of any building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him."

In order to justify this contention respondents present the novel proposition that "the amounts due depositors by the banks is not a debt. It has been so held by the courts. The banks were the actual owners of all the money and credits in their possession. They became the owner of all the money deposited with them. Of course, they must pay it back under certain circumstances, but as long as they held it they were the owner, and the courts have so held".

This is new to us, as we believe it will be to this Court. In Iowa, as elsewhere, the laws place extra precautions and impose unusual duties in regard to the repayment of de-

posits by banks. Double liability is imposed upon stockholders for this purpose. And how anyone can say that a deposit in a bank is not a debt of that bank is beyond our comprehension.

By Proposition XV in respondents' brief (Pages 157 to 158) it is contended that this action is barred by the statute of limitations.

Again, we desire to call to the court's attention the fact that the majority opinion of the Supreme Court of Iowa is not based upon this contention, although it was presented; and in the minority opinion the question is considered, answered and denied. (Record, 1386-1387.) Here it is said:

> "The appellees assert that the appellants' causes of action are barred by the statute of limitations. This contention is devoid of merit. The actions were brought within five years from the date of payment of the taxes. The period of the statute of limitations is five years and the action accrues at the time of the payment of the tax. See Par. 4, Section 11007 of the Code; *Callanan v. County of Madison*, 45 Iowa 561; *Beecher v. County of Clay*, 52 Iowa 140; *Murphy v. Board of Supervisors*, 205 Iowa 256."

XVI.

By Proposition XVI (Pages 158-160) in respondents' brief it is contended that there was no evidence of competitive moneyed capital for the year 1919. No authorities are cited to sustain this contention, and no heed was given to the contention by the Iowa Supreme Court. It appears, however, from respondents' argument that the assessments upon which the taxes were based were as of January 1, 1919, and the assessments of the competing capital shown in the Record for that year were also of the same date. The taxes based upon the assessment for the year 1919 were not payable until the year 1920, and the Record is replete with evi-

dence showing the competitive character of other moneyed capital accorded the discriminatory rate of taxation. It would only be the indulgence in repetition to specifically call the Court's attention thereto.

XVII AND XVIII.

By Proposition XVII and XVIII in respondents' brief (Pages 160 to 162) it is contended that the judgment of the Supreme Court of Iowa was not a final judgment, and therefore petitioner is not entitled to a writ in this Court.

This contention is based upon the following situation: The opinion of the Iowa Supreme Court was filed on September 26, 1930. On October 25, 1930 respondents here, appellees in the Iowa Supreme Court, served on counsel for petitioner a notice of intention to petition for rehearing, and the notice was filed in the office of the clerk on the same date. On October 27, 1930 petitioner served and filed a similar notice of intention to petition for rehearing. Neither party filed any petition for rehearing within the time required by the rules of the Iowa Supreme Court, and the judgment thereupon became final on November 25, 1930, sixty days having elapsed without the filing of a petition for rehearing by either party. (See R. 1408-1411, incl.)

The statutes of the State of Iowa relating to appeals and rehearings in the Supreme Court of that State having to do with this contention are as follows:

> "Section 12880. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing.
>
> Section 12881. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the clerk of the supreme court

within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe.

Section 12882. Such petition shall be printed, and, with proof of service thereof on the opposite party or his attorney, shall be filed with said clerk within sixty days after the opinion is filed."

"A notice of the petition for rehearing has no effect to suspend the decision, and a petition filed has no such effect, 'unless the court or one of the judges upon its presentation so order' ".

State v. Cahill, 131 Iowa 286, at 288.

The effect of the filing of the notice of intention to petition for rehearing was merely to extend the time within which such petition might be filed.

No such petition was filed in this case, and the judgment of the Iowa Supreme Court became a finality before the writ was applied for in this Court. The identical question has been considered and disposed of by this Court. In *Southern Railway Company v. Clift*, 260 U. S. 316, at 318, this Court says:

"A motion is made by defendant in error to dismiss the writ of error, this court, it is contended, being without jurisdiction. The grounds of the motion are specified as follows: (1) The judgment, at the time the transcript was filed, had not become final. (2) It did not decide any Federal question.

To sustain the first ground, it is said that, under the law of the state, within sixty days after the termination of the case by the supreme court, 'either party may file a petition for a "rehearing".' From this it is deducted and contended that the successful as well as the unsuccessful party in the action may file a petition for rehearing, and that, until the expiration of the time for the exercise of the right, the judgment does not become final. The contention is curious. Legal procedure is a facility of rights; and rights achieved, its purpose is

done. A successful litigant does not need the delay and provision of a rehearing. He has more efficient and enduring relief. His affliction may be solaced by not enforcing the victory which is the cause of it. The contention of defendant in error is so obviously untenable that further comment upon it would be the veriest supererogation."

Surely, there is no merit to the contention of respondents.

We, therefore, confidently assert that the various propositions urged by respondents are without substance, and that the decision of the Supreme Court of Iowa should be reversed, with directions to enter such order and decree as may secure to petitioner the Federal rights to which it is entitled, and which it has claimed in this proceeding.

Respectfully submitted,

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